

NOTICE

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2013 IL App (5th) 120587-U

NO. 5-12-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

KEVIN R. TURNER and KAREN M. TURNER,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Williamson County.
)	
v.)	No. 08-CH-163
)	
JERRE K. RORICK and JUNE RORICK,)	Honorable
)	James R. Moore,
Defendants-Appellees.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Spomer and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The plaintiffs failed to prove that an easement by necessity arose where they produced no evidence that their property and the property of the defendants were ever part of a single parcel owned by a single grantor. The plaintiffs failed to demonstrate that they were entitled to a prescriptive easement over the defendants' property where the undisputed evidence showed that the property was previously accessed over a different neighbor's property. The plaintiffs failed to establish that the portion of the defendants' property at issue was ever used as a public road.

¶ 2 The plaintiffs, Kevin R. Turner and Karen M. Turner, filed a petition seeking access to their land-locked property over the property of the defendants, Jerre K. Rorick, D.V.M., and June Rorick. They alleged that the strip of land over which they requested access was once a public road, which had never been vacated. The plaintiffs asserted three bases for relief: (1) an implied easement by necessity, (2) a prescriptive easement, and (3) an injunction prohibiting the defendants from denying them access to the public road. The court found that the plaintiffs failed to meet their burden of proving all three theories and,

accordingly, entered judgment for the defendants. The plaintiffs appeal, arguing that the court erred in making all three of these findings. We affirm.

¶ 3 The plaintiffs purchased a 40-acre parcel of land in Williamson County in 2004. Their property is bounded to the west by the property of the defendants, to the south by the property of Jeff Pulley, and to the east by the property of Tom Cousin. The property is bounded to the north by four smaller parcels. The property of the defendants and Jeff Pulley can be reached by Gooseneck Lane. The property of Tom Cousin and the properties north of the plaintiffs' land can be reached by other public roads. The plaintiffs' property does not have direct access to any public road. When they first purchased the land, they accessed it from a driveway on Jeff Pulley's land with Pulley's permission. Shortly thereafter, however, Pulley revoked his permission.

¶ 4 At issue in this appeal is a strip of land on the southeastern portion of the defendants' property. That strip of land consists of a line of trees and brush between two fences which runs from Gooseneck Lane to the plaintiffs' land. The plaintiffs assert that this strip of land was the original location of Gooseneck Lane. They seek to build a 30-foot-wide driveway between the fences to access their property.

¶ 5 The plaintiffs filed the instant suit in 2008. After a series of continuances, the plaintiffs filed an amended complaint seeking relief on three alternative theories. Counts I and II of the amended complaint contained identical allegations. The plaintiffs alleged that they purchased their property in 2004 and that it had no access to public roads. They alleged that prior to their purchase, their property was accessed through the adjoining property owned by the defendants. The plaintiffs further alleged that "[t]here exists a public roadway known as 'Gooseneck Lane' for access as the easement across the property owned by the Defendants." They alleged that the road was never vacated, and that the defendants refused to allow the plaintiffs access to their property. In count I, the plaintiffs requested an

easement by necessity, and in count II, they requested a prescriptive easement.

¶ 6 In count III, the plaintiffs alleged that a portion of a road called Gooseneck Lane crossed the defendants' property and reached the corner of the plaintiffs' property. They alleged that although Williamson County stopped maintaining that section of Gooseneck Lane, the road was never vacated or abandoned. The plaintiffs alleged that prior to their purchase, the property was accessed via Gooseneck Lane. Finally, the plaintiffs alleged that the defendants were refusing to allow them to use this public roadway to access their property, and that they had no other means of access. They requested an injunction prohibiting the defendants from refusing to allow the plaintiffs to access their property via Gooseneck Lane.

¶ 7 At a bench trial in this matter, Karen Turner testified that she believed that previous owners of the property "traveled on Gooseneck Lane" to access the property. She was referring to the disputed strip of the defendants' property. She acknowledged that a 2005 plat map of the area showed that Gooseneck Lane does not touch the corner of her property. She testified, however, that the plat maps from 1995 and earlier do show Gooseneck Lane touching the southwestern corner of the Turner property.

¶ 8 Five plat maps were admitted into evidence. All but the most recent show Gooseneck Lane reaching the southwest corner of what is now the plaintiffs' property. However, the precise route of Gooseneck Lane appears to be different on each plat map. On all of the maps, including the 2005 map, Gooseneck Lane begins as an east-west road a short distance to the west of the property now owned by the plaintiffs. The 2005, 1995, and 1980 maps show Gooseneck Lane turning to the southeast, taking a slightly different route on each map. On the 1995 and 1980 maps, the road touches the southwest corner of the plaintiffs' property at or near the beginning of the northwest-to-southeast portion of the road; on the 2005 map, the road turns to the southeast before reaching the plaintiffs' property. Plat maps from 1968

and 1947 show Gooseneck Lane turning south at a right angle at the corner of the property and continuing south to connect with other roads. On all of the plat maps dated later, Gooseneck Lane does not connect to any other roads at its southeastern end.

¶ 9 Karen Turner testified that she believed that the disputed strip of the defendants' land was originally Gooseneck Lane because she believed that the plat maps were accurate. Asked by the defendants' attorney how she knew that the road was actually built as shown on the older plat maps, Mrs. Turner stated that she talked to a highway engineer and visited the Historical Society. Based on this additional research, she believed that the road was actually built where the plat maps showed it to be. She was not asked to elaborate.

¶ 10 Mrs. Turner further testified that she looked at township records going back to 1941 to determine whether the disputed strip of land was ever vacated as a public roadway. She testified that she found records of other public roadways being vacated, but no records of any section of Gooseneck Lane being vacated.

¶ 11 Finally, Mrs. Turner testified that she did not remember how the Turners accessed the property the first time they came to look at it before purchasing it. She acknowledged that they used Jeff Pulley's property to access the property shortly after purchasing it. She testified, however, that one time they attempted to drive to their property over the driveway on Pulley's land, and Pulley's tenant came out of the trailer waving his arms and yelling at the Turners. She testified that he swore at them and threatened them.

¶ 12 Kevin Turner likewise testified that there was no way to access the property by vehicle. He testified that they drove to the property through Jeff Pulley's property when they looked at it before buying it and that they accessed it the same way the first two or three times they went to the property after they bought it. He explained that there was a verbal agreement between Pulley and the Turners' predecessors in title allowing access to what is now the Turner property over a driveway on Pulley's property. Shortly after the Turners

bought the property, however, Pulley revoked that agreement.

¶ 13 Although the plaintiffs cannot access their land by vehicle, Kevin Turner testified that they can walk to their property across land owned by Tom Cousin, presumably with Cousin's permission. Asked if it would be feasible to build a driveway across Cousin's land to access their property, Turner explained that it would be possible, but would require them to build a 1,320-foot driveway. He testified that this would be much less reasonable than building the proposed driveway across the defendants' property. He estimated that the disputed strip of land on the Rorick property was 300 feet in length.

¶ 14 Kevin Turner acknowledged that when he and his wife first purchased the land, the driveway on Jeff Pulley's property was the most convenient means of ingress and egress. He also acknowledged that it was still feasible to access the property via the Pulley driveway, but he reiterated the fact that Pulley had withdrawn his consent to the use of his property. In addition, using this driveway required the Turners to drive through Pulley's tenant's front yard, which "is not as desirable." By contrast, Mr. Turner testified that he could build a driveway on the disputed strip of the Roricks' property, which would be entirely between the two fence lines and would not impact any buildings. He testified that it would be approximately 15 to 20 feet away from a barn.

¶ 15 Mr. Turner testified that it was "obvious from a visual standpoint" that the disputed strip was previously used as a road. Asked to elaborate, he testified that the area was slightly depressed from the surrounding land. In addition, he testified that the fact that there were fences on both sides of the strip and the fact that it was tree-lined were also indications that the strip was once a road. He further testified that although there were "a few larger trees" in the disputed strip, it mostly consisted of "brushy undergrowth" that he would be able to clear himself in order to build the driveway.

¶ 16 The last witness to testify was defendant Jerre Rorick. He testified that he had owned

his property since 1979. In that time, he saw no evidence that Gooseneck Lane reached the property now owned by the plaintiffs. He testified that there are "quite a few" large trees in the strip of land between the fences, including one tree near the barn that is "probably 100 years old." Rorick did not believe it was feasible to build a road in the disputed strip because it was "marshy and washy."

¶ 17 Rorick testified that he built the fences on either side of the disputed strip shortly after he purchased the property. He explained that he relies on the fences to keep horses in the pasture on the portion of the property adjoining the disputed strip. He further explained that, although he rarely walks between the fence lines, he relies on the brush in the disputed strip to prevent erosion on his property.

¶ 18 Like both plaintiffs, Rorick testified that previous owners of the Turner property accessed their parcel via the driveway on Jeff Pulley's property. Rorick testified that he once allowed a previous owner to walk across his property to hunt on the land, but that was the only time his property had ever been used to access the parcel.

¶ 19 The court entered a written order setting forth its findings. The court first addressed count I of the complaint, which sought an easement by necessity. The court stated that the plaintiffs failed to submit any evidence that their property and the defendants' property were ever owned by a common grantor. The court also pointed out that the plaintiffs did not submit any evidence regarding "the condition of the properties at the time any severance of title may have occurred." Finally, the court noted that the plaintiffs "admitted there is at least one alternative means of access to their property which is more reasonable." The court thus found that the plaintiffs failed to meet their burden of proving any of the elements needed to establish an easement by necessity.

¶ 20 The court then addressed count II of the complaint, seeking a prescriptive easement. The court explained that the plaintiffs failed to demonstrate that their predecessors in title had

acquired a prescriptive easement over the defendants' property because there was no evidence regarding the previous use of the defendants' property.

¶ 21 The court last addressed count III of the complaint, which was based on the plaintiffs' assertion that the disputed strip was actually a public road, Gooseneck Lane. The court found that there was no evidence that the disputed strip had ever been a public road. The court further found that, even assuming the disputed strip was once a road, the evidence showed that it had been abandoned in favor of the present location of Gooseneck Lane. The court entered judgment in favor of the defendants. This appeal followed.

¶ 22 On appeal, the plaintiffs argue that the trial court erred in ruling against them on all three claims. We disagree.

¶ 23 The first two of the plaintiffs' claims involve alleged easements. Easements may be created three different ways—by grant, by implication, or by prescription. *Seiber v. Lee*, 158 Ill. App. 3d 361, 367-68, 511 N.E.2d 1296, 1300 (1987). Two types of easements arise by implication—easements by preexisting use and easements by necessity. *Gacki v. Bartels*, 369 Ill. App. 3d 284, 289, 859 N.E.2d 1178, 1184 (2006). The first type arises where a common grantor conveys land already subject to an easement. The second arises when a grantor conveys a parcel of land which has no access to a public road except over the remaining land of the grantor or the property of others. *Seiber*, 158 Ill. App. 3d at 369, 511 N.E.2d at 1301. The party seeking to establish the existence of an easement must prove the facts giving rise to the easement by clear and convincing evidence. *Gacki*, 369 Ill. App. 3d at 290, 859 N.E.2d at 1184. We will not set aside a trial court's findings regarding those facts unless they are against the manifest weight of the evidence. *Martin v. See*, 232 Ill. App. 3d 968, 978, 598 N.E.2d 321, 328 (1992).

¶ 24 Two types of easements are at issue here—an implied easement by necessity and a prescriptive easement. As previously noted, an easement by necessity arises when a grantor

conveys a portion of the grantor's land that is not accessible to a public road except over the grantor's remaining property or the property of others. *Seiber*, 158 Ill. App. 3d at 369, 511 N.E.2d at 1301. To prove the existence of an easement by necessity, the plaintiffs must prove that (1) their property and that of the defendants were previously owned by a common grantor, (2) title to the two properties was severed, and (3) the plaintiffs' property became land-locked as a result of the severance. *Gacki*, 369 Ill. App. 3d at 291, 859 N.E.2d at 1184-86.

¶ 25 "It is crucial to recognize that an implied easement is the product of the intention of the parties to the conveyance." *Gacki*, 369 Ill. App. 3d at 289, 859 N.E.2d at 1184. An easement by necessity arises because it is presumed that the grantor did not intend to convey land with no access to a public road. *Gacki*, 369 Ill. App. 3d at 290, 859 N.E.2d at 1184. Because the existence of the easement depends on the presumed intentions of the parties to the conveyance, the party seeking an easement by necessity must demonstrate that the parcel lacked access to a public road at the time title was severed *and* that it still lacks such access. *Gacki*, 369 Ill. App. 3d at 291-92, 859 N.E.2d at 1186. The party need not show absolute necessity. *Seiber*, 158 Ill. App. 3d at 371, 511 N.E.2d at 1302. However, where there is a reasonable alternative means of access, the court should not find that an easement by necessity exists. *Gacki*, 369 Ill. App. 3d at 290, 859 N.E.2d at 1185.

¶ 26 Here, as the court correctly noted, the plaintiffs presented absolutely no evidence that their land and the land owned by the defendants were ever owned by a common grantor. Indeed, they did not even allege that the two parcels were ever owned by a single grantor. This alone is sufficient to defeat their claim that an easement by necessity exists over the defendants' property. See *Martin*, 232 Ill. App. 3d at 981, 598 N.E.2d at 330. The court correctly found that the plaintiffs failed to meet their burden on this claim.

¶ 27 The second type of easement claimed by the plaintiffs is an easement by prescription.

A party seeking to establish such an easement must demonstrate that the party or his predecessors in title used the land subject to the claimed easement for a period of at least 20 years, and that this use was adverse, exclusive, continuous and uninterrupted, and under a claim of right. *Seiber*, 158 Ill. App. 3d at 368, 511 N.E.2d at 1301. Here, Kevin Turner testified that the previous owners told the plaintiffs that they accessed the property by a driveway on Jeff Pulley's property. Both Kevin and Karen Turner testified to using this driveway to access the property when they first purchased it. Jerre Rorick testified that he allowed a previous owner to access the property by walking across his property one time.

¶ 28 The only evidence that anyone had ever accessed the property using the proposed easement was Karen Turner's testimony that she "believed" previous owners used the disputed strip to drive to the property at a time when, according to the plaintiffs, it was maintained by Williamson County as Gooseneck Lane. The court was not required to accept this testimony and disregard the testimony to the contrary. It is worth noting that the plaintiffs did not see the property at issue prior to purchasing it in 2008, and they did not present the testimony of any long-term residents who might have been able to verify this claim from personal observations. Moreover, even assuming the court found that the disputed strip was ever used to access the property, the plaintiffs presented no evidence as to the nature and length of that use. The court's finding that the plaintiffs failed to meet their burden of establishing a prescriptive easement was not against the manifest weight of the evidence.

¶ 29 In their third claim, the plaintiffs assert that the disputed strip is a public roadway that has never been vacated or abandoned. The trial court found that the evidence did not support their claim that the disputed strip was ever a public road. The court further found that, even assuming it was ever a public road, the evidence showed that it had been abandoned. The plaintiffs argue that both of these findings are against the manifest weight of the evidence.

We disagree.

¶ 30 The plaintiffs point to the testimony of Kevin Turner as well as the earlier plat maps in support of their contention. As previously discussed, Mr. Turner testified that three things about the features of the disputed strip indicated to him that it had previously been used as a road: (1) the area was slightly depressed from the surrounding land, (2) it was lined by trees, and (3) it was lined by fences. On appeal, the plaintiffs contend that this court "may infer" from this evidence "that Gooseneck Lane physically existed as found in the 1995 plat." However, the trial court, as finder of fact, must decide what inferences should be drawn from the evidence. As a court of review, we may not substitute our judgment for that of the trial court. *Best v. Best*, 223 Ill. 2d 342, 350-51, 860 N.E.2d 240, 245 (2006).

¶ 31 We believe there was ample evidence in the record to support the court's conclusion. The only evidence to support the plaintiffs' contention that Gooseneck Lane once reached their property was the testimony of Kevin Turner and the plat maps. The plaintiffs point out that Kevin Turner testified that he works for the United States Environmental Protection Agency as a scientist involved in emergency response and short-term cleanup. They imply that this experience gives him expertise in determining what features are indicative of a prior road. However, he did not testify at trial that this was the case. More importantly, the plaintiffs did not attempt to qualify him as an expert witness. Jerre Rorick testified that he had never seen the disputed strip used as Gooseneck Lane in the 30 years he had owned the property, and the plaintiffs did not present testimony from any long-time residents to dispute this testimony.

¶ 32 We also find little support for the plaintiffs' assertion in the plat maps. As previously discussed, they appear to be inconsistent. The plaintiffs offered no testimony or documents to explain the inconsistencies, nor did they offer any testimony from longer-term residents about the actual location of Gooseneck Lane at various times. We also note that aerial

photographs introduced by both parties do not show a diagonal road veering southeast from Gooseneck Lane at the southwest corner of the plaintiffs' property, as shown on the 1980 and 1995 plat maps, or the north-south road connecting to Gooseneck Lane at the corner of their property on the 1968 and 1947 maps. Asked when Gooseneck Lane was moved to its present location, Kevin Turner testified that he only knew what the plat maps showed, but he thought that "it could probably be earlier than 1995." We find that the plaintiffs failed to prove that the disputed strip was previously used as Gooseneck Lane.

¶ 33 In addition, we find that, even assuming the plaintiffs demonstrated that Gooseneck Lane once existed in the disputed strip of the defendants' property, the evidence supports the court's finding that it was abandoned in favor of its current location.

¶ 34 Once a public road is established, it remains a public road unless it is either abandoned or formally vacated pursuant to statutorily-prescribed procedures (see 605 ILCS 5/6-303 (West 2012)). *Hart v. Town of Shafter*, 348 Ill. App. 3d 713, 715, 810 N.E.2d 489, 491 (2004). A road is considered to be "an indispensable necessity that the public would not abandon without replacing." *Hart*, 348 Ill. App. 3d at 717, 810 N.E.2d at 492. Thus, "something more than the mere nonuse of the road must be shown to demonstrate abandonment." *Hart*, 348 Ill. App. 3d at 717, 810 N.E.2d at 492. To show that a road has been abandoned, a party must show either that the public has acquired the legal right to another road or that the necessity for the road no longer exists. *Hart*, 348 Ill. App. 3d at 717, 810 N.E.2d at 492. Here, there was no evidence that any portion of Gooseneck Lane had ever been formally vacated. However, the undisputed evidence showed that the county had acquired the legal right to use Gooseneck Lane in its current location in place of any earlier location. Thus, assuming Gooseneck Lane was previously located in the disputed strip, the evidence showed it had been abandoned. The court's ruling on this claim was supported by the evidence.

¶ 35 For the reasons stated, we affirm the judgment of the trial court.

¶ 36 Affirmed.